



MISSOURI PROSECUTOR

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PROTECTING LIVES, SAVING FUTURES

March 1-3, 2006

Courtyard by Marriott; Columbia, MO

The MOPS office is pleased to present a free training opportunity for prosecutors and assistants in Missouri. "Protecting Lives, Saving Futures" is a course designed to create a team-building approach between prosecutors and law enforcement officers to aid in the detection, apprehension and prosecution of impaired drivers.

The training includes instruction on impairment due to alcohol and other drugs. Leading experts in the field of toxicology, optometry, prosecution and law enforcement will present the multi-disciplinary curriculum to police officers and county prosecutors, allowing the participants to learn firsthand the challenges and difficulties each faces in impaired driving cases. The course will also include a controlled drinking workshop.

This is a basic-level course designed for prosecutors and law enforcement officers with limited experience in the detection, apprehension and prosecution of impaired drivers. Law enforcement officers attending the course should have completed the basic Standardized Field Sobriety Test training.

The course has been approved for 24.6 hours of Missouri CLE credit. POST certification is pending.

The costs of lodging, breakfast and lunch for up to thirty students will be covered. Participating jurisdictions will need to cover the costs of travel to and from Columbia, the cost of evening meals, and any other related expenses.

Due to space and funding limitations, applications will be required. Preference will be given to applications submitted jointly by a police officer and prosecutor from the same county. (A registration form is included on [page 15](#) of this newsletter.) Joint applications are not, however, required. An application form is attached. Individuals whose applications are accepted will be notified and provided further details.

Please contact Bev Case or Susan Glass at 573-751-0619 with questions.

Funding for this training is provided through MoDOT Highway Safety.



2005 SUPPLEMENTS NOW AVAILABLE

You should have received an order form for 2005 Missouri Approved Instructions—Criminal and Missouri Approved Charges—Criminal from Supreme Court Publications.

A blank order form is included on [page 16](#) of this newsletter. If you did not receive a pre-printed form, please include your information and return to "Supreme Court Publications."



JUMPSTART

Two Trainings for
Newly Assigned Juvenile Prosecutors

JUMPSTART Training Courses are taught by experienced juvenile prosecutors and other experts, such as mental health and animal cruelty professionals. Participants will discuss unique issues facing juvenile prosecutors, such as: Charging decisions; Interviewing and preparing child witnesses; Interpretation of psychological and psychiatric reports; Disposition; Trial and negotiation strategies and techniques; Competency to stand trial; Infancy defenses; Waiver of *Miranda* rights; Search and seizure on school property; Animal cruelty and its implication for juvenile prosecutors; Truancy and diversion programs; Arson; and Juvenile sex offenders.

JUMPSTART is designed for prosecutors who will be assigned to prosecute in juvenile court, who have been prosecuting in juvenile court for less than two years, or who want a refresher course on substantive juvenile justice issues.

Each 2 1/2 day course offers similar curriculum and materials. Attendees will have their choice of locations: Austin, Texas (January 25-27, 2006) and Newport, Rhode Island (April 26-28, 2006).

There will be NO REGISTRATION FEE for this course. Participants will be responsible for their own travel and lodging expenses. Rooms are available at a discounted rate at the hotel where the course is being held.

Link to Full Announcement

http://www.ndaa-apri.org/education/apri/jumpstart_austin_newport_2006.html



OVW FY 2006 Rural Domestic Violence and Child Victimization Enforcement Grant Program

The Rural Domestic Violence and Child Victimization Enforcement Grant Program (Rural Program) recognizes that victims of domestic violence, dating violence and child victimization living in rural jurisdictions face unique barriers to receiving assistance and additional challenges rarely encountered in urban areas. The geographic isolation, economic structure, particularly strong social and cultural pressures, and lack of available services in rural jurisdictions significantly compound the problems confronted by those seeking support and services to end the violence in their lives and complicate the ability of the criminal justice system to investigate and prosecute domestic violence, dating violence, and child victimization cases. In addition, sociocultural, economic, and geographic barriers create difficulties for victim service providers and other social services professionals to identify and assist victims of domestic violence, dating violence, and child victimization.

The primary purpose of the Rural Program is to enhance the safety of victims of domestic violence, dating violence, and child victimization by supporting projects uniquely designed to address and prevent these crimes in rural jurisdictions. OVW welcomes applications that propose innovative solutions for achieving this goal. The Rural Program challenges victim advocates, law enforcement officers, pre-trial service personnel, prosecutors, judges and other court personnel, probation and parole officers, and faith- and/or community-based leaders to collaborate to overcome the problem of domestic violence, dating violence and child victimization and to ensure that victim safety is paramount in providing services to victims and their children.

Applications must be received by 5:30 pm, January 12, 2006.

Link to Full Announcement

<http://www.ojp.usdoj.gov/docs/fy2006ruraldomesticviolencesolicitation.pdf>

ENSURING the SUSTAINABILITY of DRUG COURTS

If your drug court has not developed a long-term strategic plan that focuses on the institutionalization of your current operating systems within the community and the larger judicial environment, you could be at risk.

More than merely struggling to exist and operate, the goal of any drug court must be to develop independent, institutionalized operations within the local community as well as in a larger criminal justice context. The National Drug Court Institute (NDCI) is pleased to announce a 2-day training program focused on this critical need.

Experts across the country developed this training program to equip drug court professionals with the skills and tools they need to develop long-term strategies that focus on the institutionalization of their program.

This training is designed to help drug court teams develop a strategic plan for funding. Because the workshop is highly interactive and focuses on group decision making, the training experience will be enhanced by the attendance of a minimum of three team members who understand or are responsible for the funding of the program.

Workshops will be held February 23-24, 2006, in Atlanta, GA and March 23-24, 2006 in Denver, CO.

For more information please visit:
<http://www.dcpj.ncjrs.org/dcti.html>

SENIOR ATTORNEY, NATIONAL CENTER FOR PROSECUTION OF VIOLENCE AGAINST WOMEN

APRI is seeking an experienced prosecutor with expertise in prosecuting violence against women. The ideal candidate will have experience investigating and prosecuting adult sexual assault, particularly nonstranger sexual assault. Additionally, the ideal candidate will have experience with prosecuting domestic violence, stalking and cyber stalking. Candidates should have knowledge of current research, policies and protocols related to these areas as well as familiarity with diverse and underserved populations.

A complete job description will be posted at
http://www.ndaa-apri.org/employment/apri_index.html.



ELECTED PROSECUTOR MEETING REGISTRATION

If you plan to attend the Elected Prosecutor Meeting in Branson, please be sure that you have sent your registration form to the MOPS office.

CLE CERTIFICATIONS

Certifications for Elected Prosecutors who qualify for the 20 hours CLE certification under Section 56.265.2, RSMo, were due in the MOPS office December 15.

If you have not yet returned your certification letter, please do so as soon as possible.

PROSECUTOR DIALOG MAINTENANCE

Please remember to include Prosecutor Dialog maintenance in your 2006 budgets. Plan to pick up the same amount as last year.

**NEW LAW ISN'T REDUCING METH LAB SEIZURES**

By Matthew Hathaway
ST. LOUIS POST-DISPATCH
Tuesday, Dec. 13 2005

Despite a new state law supposed to make it near impossible to buy the hundreds of cold pills needed to make methamphetamine, Jefferson County drug investigators didn't see any meaningful drop in the number of meth-related raids and seizures this year.

Sgt. Gary Higginbotham, commander of Jefferson County's drug task force, said by year's end the unit will have uncovered about 250 suspected meth labs, ingredient stockpiles or dumpsites. If that prediction holds true, the task force would finish the year with only slightly fewer than the 259 lab raids and meth-related discoveries that the Missouri Highway Patrol credited to Jefferson County police last year.

That wasn't supposed to happen.

A Missouri law that went into effect July 15 makes most over-the-counter medications containing pseudoephedrine, an essential ingredient of meth, into Schedule 5 controlled substances. That means consumers who want to buy Sudafed and many other decongestants now can get them only at pharmacies, and buyers must agree to have their identities recorded in logs that can be inspected by police.

The law also restricts the amount of pseudoephedrine anyone can buy in a month, though there currently is no way for pharmacies to determine if a shopper already has bought pills at another store.

When the law went into effect, police and politicians promised that methamphetamine labs quickly would dry up across Missouri, and that the so-called cooks who make the powerful narcotic would either import meth from elsewhere or move their operations to other states.

But that isn't happening in Jefferson County, the state's perennial leader in the number of meth labs raided by police. Last month, the drug task force raided 26 meth labs, up from 24 in November last year. Higginbotham said that meth production in the county shows no sign of slowing down.

"After the law went into effect, the (meth) cooks were confused for a few weeks ... but after that it was back to the same-old, same-old," Higginbotham said. "In fact, if it weren't for some manpower shortages we had this year, we would have had as many or more labs than last year."

Higginbotham said that most Jefferson County retailers are following the new law and cooperating with police, but that meth cooks are avoiding the new restrictions by shopping for pseudoephedrine in Illinois, the only state bordering Missouri that hasn't enacting a similar law.

Higginbotham also noted that, according to police informers, meth cooks in the county might have discovered a more troubling source for pseudoephedrine: medications not covered by the law. Those pseudoephedrine remedies were exempt because lawmakers believed that to use them to make meth would require too much scientific knowledge and technical skill.

Over the years, meth makers have improvised time and again ways to stay one step ahead of laws and restrictions. The informers' stories could be the stuff of drug underworld legend, but police aren't sure.

"We haven't run into any of those labs yet, but we're looking for them," Higginbotham said.

**PROSECUTING ATTORNEY & CIRCUIT
ATTORNEY'S RETIREMENT FUND**

**For questions regarding the retirement system
please contact:**

Katrina Farrow, Executive Secretary
PO Box 104896
Jefferson City, MO 65110
Phone: (573) 556-7985
Fax: (573) 556-7986



**WITNESS PROTECTION ASSISTANCE IS
AVAILABLE THROUGH THE MOPS OFFICE.**

**FOR INFORMATION, YOU MAY CALL SHERI
AT (573) 522-1838.**

DURBIN, SPECTER, DEWINE OFFER BIPARTISAN PROPOSAL TO RELIEVE FINANCIAL BURDEN ON YOUNG PROSECUTORS, PUBLIC DEFENDERS

Senator Says New Legislation Would Establish Federal Student Loan Repayment Plan for Law Grads, Make Public Service Careers More Attractive

[WASHINGTON, DC] - With the average law graduate carrying a staggering amount of student loan debt -- \$97,763 for those who attended private schools and \$66,810 for public schools -- U.S. Senator Dick Durbin (D-IL) today introduced bipartisan legislation to make public service careers more viable for law school graduates. The legislation, which was co-sponsored by the chairman of the Senate Judiciary Committee, Sen. Arlen Specter (R-PA) and Sen. Mike DeWine (R-OH), would establish a student loan repayment option for full-time prosecutors and public defenders who agree to serve as public interest attorneys for a minimum of three years.

"With the cost of higher education continuing to climb, it is important that young lawyers choosing to defend the poor or serve as criminal prosecutors have access to the same quality legal education as their high-paid corporate counterparts," Durbin said. "Loan repayment can go a long way to help young lawyers fresh out of law school do legal work for the public good and also be able to pay rent and raise a family."

Durbin and the other lawmakers cited the contrast between the average loan debt for today's law school graduate and the average entry-level salary for a prosecutor or public defender as evidence of the need for relief. In 2004, almost 87 percent of law students borrowed to finance their legal education, and the amount borrowed by many students exceeds \$80,000. Many of these students also carried unpaid debt from their undergraduate studies. At the same time, the median entry-level salary for public defenders is \$39,000 per year and the starting salaries for local prosecuting attorneys is similar, starting at about \$40,000 per year.

From an employer's perspective, low salaries and high debt make it extremely difficult to recruit and retain attorneys in prosecutor and public defender offices. The Department of Justice has found that almost one-third of prosecutor's offices reported problems with recruitment and retention of staff attorneys.

In addition, results of a survey by Equal Justice Works and the Partnership for Public Service show that a majority of public interest law employers, including public defender offices, report significant difficulty in attorney recruitment and retention. In recruiting efforts, 89 percent of employers identified low salaries and 88 percent identified high educational debt as major impediments.

"Without question, the nation's public interest legal professions face a 'brain drain' that threatens the integrity of our criminal justice system," Durbin said. "Offices of prosecutors and public defenders must have the ability to recruit and retain highly qualified attorneys to prosecute criminal cases and represent the accused."

Durbin's legislation - the Prosecutors and Defenders Incentive Act - is modeled after the student loan repayment program currently available to federal employees. Like the federal employee program, attorneys eligible for loan repayment could have up to \$10,000 per year of student loan debt repaid. Loan repayments are capped at a maximum of \$60,000 per individual.

The proposed loan repayment program is supported by the American Bar Association, the National District Attorneys Association, the National Association of Prosecutor Coordinators, the National Legal Aid and Defender Association, and the American Council of Chief Defenders.

MOPS.MO.GOV

The MOPS website contains conference information (ie. dates, registration, agenda and CLE credits), MOPS and Traffic Safety newsletter archives, the 2005 legislative summary, Prosecuting Attorney contact information and much more.

<http://www.mops.mo.gov/>



MOSAFE— Fighting Financial Exploitation of Vulnerable Adults

Missourians Stopping Adult Financial Exploitation (MOSAFE) is a project launched by the Department of Health and Senior Services (DHSS) in cooperation with major financial and law enforcement associations. Its purpose is to help protect elderly (age 60 and over) and disabled (aged 18 through 59) Missourians from one of the fastest growing crimes in the country—financial exploitation. MOSAFE is designed to:

- Promote awareness and utilization of safe banking practices;
- Stop attempted or ongoing financial exploitation before a vulnerable adult's account of funds are exhausted;
- Recover funds and assets that have been exploited;
- Pursue prosecution of perpetrators, through law enforcement agencies and prosecuting attorneys.

Financial institutions—e.g., banks and credit unions—can be a first line of defense against financial exploitation. Often, employees can identify suspected exploitation and report it to DHSS and/or the proper law enforcement agency. DHSS has been statutorily designated to receive and investigate such reports.

MOSAFE has inaugurated a training program for the employees of banks and credit unions to enable them to recognize the principle warning signs of financial exploitation of elderly and disabled citizens. These employees are further encouraged to report suspected cases of financial exploitation to the DHSS' toll-free hotline (1-800-392-0210). The training materials are available on a CD and DVD, and include a video illustrating some of the common forms of exploitation and actions financial institutions can take to promote safe banking for their customers and members. Also included in the kit are a resource manual, PowerPoint presentation, brochure, and eight articles. With the assistance of the Missouri Bankers Association and the Missouri Credit Union Association, the MOSAFE training kit has been distributed to all banks and credit unions in Missouri.

DHSS has staff trained to investigate abuse, neglect, and exploitation reports in all 114 counties in Missouri, as well as St. Louis City. What's more, DHSS' Office of Special Investigations has specialized staff with law enforcement and investigative backgrounds that can handle extensive financial exploitation investigations. If any investigation determines that a crime has been committed, DHSS is mandated to notify law enforcement and county prosecutors. DHSS will seek to cooperate with law enforcement and prosecuting attorneys across the state to help collect the evidence needed to ready the case for prosecution.

Financial exploitation of elderly and disabled persons knows no socioeconomic class, race, party, or religious affiliation. It destroys lives, forces premature nursing facility placement, impacts Medicaid by increasing state spending, and causes a loss of dignity and a life cloaked in fear. Usually, when financial exploitation occurs, a victim is being abused or neglected in other ways, too. Please help. Work with DHSS investigators. Let them know how they can work with you.

If you have any questions or would like more information about MOSAFE, please visit DHSS' website, www.dhss.mo.gov/MOSAFE/, or call Project Director Marta Fontaine at 573/526-3246.

Missouri Combats Financial Exploitation

Financial exploitation is one of the fastest growing crimes in the country. With the senior population increasing and the median income of seniors being greater than the national average, reports of financial exploitation are on the rise.

In a recent interview with the North County Times, San Diego Deputy District Attorney, Paul Greenwood, head of the District Attorney's Elder Abuse Unit and one of the leading experts in the field, stated, "The 85-and-older age group is the country's fastest-growing population and one of the most tempting targets for many criminals. Some victims are vulnerable because of dementia, but even the clear-minded elderly are targets for con men because they often will not report a crime because of shame or fear of losing their independence."

Many perceive that scams and financial exploitation are committed by con artists, strangers, or unscrupulous contractors. However, Adult Protective Services (APS) agencies across the country find that most reports of exploitation list a family member, caregiver, or acquaintance as the perpetrator. Victims may be less likely to report if they are being exploited by a loved one. Unfortunately, exploitation perpetrated by family is often viewed as a civil rather than a criminal matter.

Depending on circumstances, there are a number of laws in Missouri under which financial exploitation can be prosecuted. These include:

Statute	Crime
198.097	Misappropriation of funds of elderly nursing home residents
570.030	Stealing
570.090	Forgery
570.130	Fraudulent use of a credit device
570.135	Fraudulent procurement of a credit or debit card
570.145	Financial exploitation of the elderly and disabled
570.223	Identity theft
660.305	In-home services client misappropriation of property (includes falsification of service delivery documents)

This article calls attention to two of these statutes aimed at the protection of seniors and disabled adults.

Misappropriation of Funds of Elderly Nursing Home Residents (198.097), is an underutilized statute that addresses persons assuming responsibility for managing the finances of a nursing home resident. If the resident has funds, but the financial manager fails to pay the nursing facility for the resident's care, the financial manager may be found guilty of a Class D felony.

During the last legislative session, significant revisions to the statute, Financial Exploitation of the Elderly and Disabled (570.145), simplify its language and increase penalties for violators.

- 1) The definitions of "elderly person" and "disabled person" have been simplified to remove the language dealing with capacity.

Elder person is now defined as "a person sixty years of age or older".

Disabled person has been amended to read "a person with a mental, physical, or developmental disability that substantially impairs the person's ability to provide adequately for the person's care or protection".

- 2) "Intimidation" has been amended to include "a threat of physical or emotional harm to an elderly or disabled person".
- 3) Lastly, the penalties for Financial Exploitation of the Elderly and Disabled have been amended to raise the penalty to a Class A felony if the amount of the exploitation is \$50,000 or more, as shown below.

Less than \$50—Class A misdemeanor

\$50 but less than \$500—Class D felony

\$500 but less than \$1,000—Class C felony

\$1,000 but less than \$50,000—Class B felony

\$50,000 or more—Class A felony

As a result of these changes, we believe that prosecuting attorneys will now find this law a better tool for prosecuting some of the criminals that prey on vulnerable adults in Missouri.

Remember, financial exploitation is a crime, whether committed by a con artist or a family member. And, just as in domestic violence and child abuse cases, prosecutors don't have to have a cooperative victim in order to prosecute. Help protect Missouri seniors and disabled adults. Prosecute crimes of financial exploitation. As the justice system has taught us, it is the certainty of punishment that is the greatest deterrent for perpetrators.



The MOPS office has started an index of opinion topics included in the monthly Caselaw Update, beginning with October 2004. If you would like a copy, please contact Sheri at the MOPS office.

MISSOURI SUPREME COURT

► *Stealing Third Offense*

Terry J. Woods v. State, No. SC87028 (Mo. banc December 6, 2005). Section 570.040, Stealing Third Offense, requires the previous guilty pleas to be on separate occasions. This statute, as first enacted, did not contain the "separate occasion" language but merely specified that every person who was "previously convicted of stealing two times" was subject to an enhanced penalty. Section 570.040, RSMo 1978. The general assembly subsequently changed this language to include the "separate occasion" requirement.

► *Pro Se Defendant - First Degree Murder*

State v. David Stanley Zink, No. SC86358 (Mo. Banc November 22, 2005). In this capital case in which defendant received the death penalty, the trial court did not err in allowing him to represent himself and in failing to replace standby counsel appointed from the public defender's office. Defendant voluntarily, knowingly and intelligently waived his right to counsel during his trial. The court gave him two opportunities to reconsider his decision before the trial began, and both times he declined. The court also told defendant he could change his mind about representing himself at any time during the trial simply by notifying the court. He did not accept this invitation during the guilt phase of the trial, but he did turn his defense over to the public defenders for the sentencing phase of his trial. He also allowed standby counsel to address the defense of diminished capacity. He also consented to the introduction of evidence to support this defense, the submission of diminished capacity jury instructions during both phases of the trial, and the summation of this defense during closing arguments of both phases of the trial.

Defendant offered nothing but speculation that the state's minimal use of the words "murder," "kidnapping," "abduction" and "crime scenes" prejudiced his case or denied him a fair trial. The state used the words in a manner that did not constitute dictating a legal conclusion to the jury, and the jury was instructed about the elements it had to find beyond a reasonable doubt to convict of first-degree murder, second-degree murder and voluntary manslaughter.

MISSOURI EASTERN DISTRICT

► *Bifurcated Trials – Evidence of Acquitted Crimes*

State v. Calvin Kevin Clark, No. ED84783 (Mo. App. E.D. December 6, 2005). Evidence of acquitted crimes was admissible during the sentencing phase of the trial. A jury's verdict of acquittal does not prevent the court, in the sentencing phase of the trial, from considering conduct underlying the acquitted charge, so long as that conduct has been proved by a preponderance of the evidence.

► *Resisting Arrest – Sufficiency of Evidence*

State v. Wilbert Hunter, No. ED85151 (Mo. App. E.D. November 29, 2005). There was insufficient evidence to convict defendant of felony resisting arrest. The officer stopped his patrol car at a stoplight behind a pick-up truck matching the dispatcher's description and shined a spotlight into the truck. As soon as he activated his spotlight, the driver of the pick-up truck drove through the red light prompting the officer to activate his roof lights and follow the pick-up truck. The record did not contain sufficient facts from which reasonable jurors could have found that defendant was fleeing from a police officer, the officer was arresting defendant or even that the officer was contemplating defendant's arrest. There was insufficient proof that defendant reasonably should have known that, when he saw a police car following a pick-up in which he was a passenger, he was being arrested for felony burglary. Moreover, the officer never testified that when he turned on his patrol lights and followed the pick-up, he intended to arrest defendant for burglary. The Court declined to enter a judgment of misdemeanor resisting arrest because the jury was not required to find all of the elements of misdemeanor resisting arrest in order to convict defendant of felony resisting arrest.

MISSOURI WESTERN DISTRICT

► *Methamphetamine – Conspiracy to Manufacture/Possession*

State v. Shane M. Beggs, No. WD64068 (Mo. App. W.D. December 13, 2005). Under Section 564.016.7, RSMo, the trial court plainly erred in entering judgments for both conspiracy to manufacture methamphetamine and possession of lithium batteries with the intent to manufacture methamphetamine because the possession of lithium batteries formed a partial basis for the conspiracy charge. Thus, defendant could not be charged with conspiracy to possess lithium batteries and possession of lithium batteries. There was sufficient evidence to find either that defendant intended to use the lithium batteries to manufacture methamphetamine or he intended to trade the

**MISSOURI WESTERN DISTRICT continued****State v. Shane M. Beggs continued**

batteries to a third party to use to manufacture methamphetamine.

There was sufficient evidence to find defendant consciously and intentionally possessed methamphetamine and he had an awareness of the drug's presence and nature. After being stopped by police for running a stop sign and erratic driving and arrested, defendant submitted to a Breathalyzer test, which indicated he was not under the influence of alcohol. When asked why he appeared to be impaired, the appellant admitted that he had smoked methamphetamine. During a subsequent interview, he admitted that some of the methamphetamine he had been smoking was left at his apartment. Pursuant to a search warrant issued for the apartment, methamphetamine was found on a set of scales found in the master bedroom, which defendant shared. A witness testified that the methamphetamine found on the scales was "probably" left over from the gram and a half that she and appellant had purchased and used together.

► ***Endangering the Welfare of a Child – Charges/ Sufficiency of Evidence***

State v. Stacy R. Todd, No. WD65090 (Mo. App. W. D. November 29, 2005). The Court affirmed defendant's conviction for second-degree endangering the welfare of a child, section 568.050.1(1), RSMo 2000, for leaving her nine-year-old son in her car on a hot summer day while she gambled at a casino. The charging instrument, stating Todd's conduct but not specifying the nature of the risks consequent to that conduct, precisely followed the charging instructions the Supreme Court of Missouri approved and, therefore, was legally sufficient. The trial court's findings, expressing the various risks defendant's behavior presented to the child, did not constitute judicial notice, but merely non-adjudicative facts. A court or jury is not barred from considering non-adjudicative facts, because in conducting a process of judicial reasoning, not a step can be taken without assuming something which has not been proved; and the capacity to do this with competent judgment and efficiency is imputed to judges and juries as part of their necessary mental outfit.

Sufficient evidence supported the finding that defendant's conduct presented a substantial risk to the child by leaving her nine-year-old son alone in a locked minivan in a casino parking lot in the summer sun in 94-degree heat while she gambled. "Substantial" means "not seeming or imaginary;" "risk" means "the possibility of loss, injury, disadvantage, or destruction. These facts are sufficient, in the totality of the circumstances, for a fact finder to conclude

that defendant's conduct presented a substantial risk to the child's life, body and health. Sufficient evidence supported finding that defendant acted with criminal negligence. Defendant conceded that she was aware of the risk her son would become overheated in the car or be abducted, as evidenced by her covering some of the windows, leaving the air conditioner on, and locking the doors. She instructed her son to lie about why he was waiting in the car: she told him to say she went to look for someone, but two minutes after entering the gaming floor, she was playing cards. Because defendant acted knowingly, the standard for criminal negligence is also met.

► ***Instructional Error – Claim of Right Defense***

State v. Mardell Lynn January, No. WD64109 (Mo. App. W.D. November 22, 2005). The Court reversed defendant's convictions of second-degree burglary and stealing when the court failed to instruct on claim of right defense. Once the issue of claim of right is injected into the case, the state has the additional burden of proving, beyond a reasonable doubt, that she, in taking the property, was not acting with an honest belief that she had a right to do so, in the same way they must prove all the other elements of stealing. Since the trial court failed to instruct on the claim of right defense, the state was essentially relieved of proving a disputed element of its case beyond a reasonable doubt. This is automatic plain error, requiring an automatic finding of manifest injustice and a miscarriage of justice.

MISSOURI SOUTHERN DISTRICT

► ***Ineffective Assistance of Counsel – Impeachment/ Instructions***

Frankey Lane Coday v. State, No. 26327 & 26351 (Mo. App. S.D. November 30, 2005). In this appeal from a Rule 29.15 proceeding, based on a conviction of first degree murder and armed criminal action, the circuit court clearly erred in granting the motion for ineffective assistance of counsel for failing to impeach a prosecution witness. There was no showing the proposed impeachment created a reasonable probability that the trial's outcome would have been different. "If a prior inconsistent statement by a state's witness does not give rise to a reasonable doubt as to defendant's guilt, such impeachment evidence is not the basis for a claim of ineffective assistance of counsel."

The court erred in ordering a new trial because trial counsel was ineffective for failing to request a modification of the accomplice liability instruction. Counsel testified that she did not request this modification because it would have been inconsistent with the alibi defense. The motion

**MISSOURI SOUTHERN DISTRICT continued****Frankey Lane Coday v. State continued**

court also erred in ordering a new trial because trial counsel was ineffective for failing to object to testimony based on ***Bruton v. United States***. The testimony was admissible as the statements of a co-conspirator engaged in a continuing conspiracy with the defendant.

► ***Assault in the First Degree – Serious Physical Injury/Stabbing***

David Gregory Orr, v. State, No. 26719 (Mo. App. S. D. November 30, 2005). There was sufficient factual basis to support a guilty plea to first degree assault with serious physical injury by stabbing the victim repeatedly. The injuries created a substantial risk of death or caused serious disfigurement or protracted loss or impairment of the function of parts of his body. The consequences of these injuries were magnified in this case because the victim was in a weakened condition because he was recovering from colon cancer. "It defies logic to suggest that stabbing someone multiple times in various areas of the body, including a wound to the lungs, would cause anything less than serious physical injuries."

► ***Criminal Non Support – Good Cause for Failure to Provide Adequate Support***

State v. Robin Lee Pettry, No. 26631 (Mo. App. S.D. November 28, 2005). Defendant failed to meet his burden of injecting the issue of good cause for failure to provide adequate support in a prosecution for criminal non-support. Defendant's evidence regarding a back injury in 1996, failed to inject the issue of good cause. Other than an exam in 1997, there was no further evidence regarding this injury until 2001, when a physician recommended therapy but said nothing about employability. Nothing is offered on Defendant's condition during the year of 2000. Therefore, the State was not required to prove Defendant's failure to provide adequate support for his children was without good cause.

► ***Mirandas – Invocation of Right to Remain Silent***
State v. Gerald E. Rayborn, No. 26635 (Mo. App. S. D. November 28, 2005). The Court did not error in refusing to declare a mistrial when a detective testified that defendant was given his Miranda warnings, "He stated that he would rather —". The Court did not find that the only conclusion the jury could have reached was that defendant had invoked his right to remain silent and to have an attorney present. It was "pure speculation" to determine what the jury thought of the partial answer. Although not asking the most precise question, the prosecutor was entitled at trial to get to his real question concerning the actual, un-

solicited statement that defendant had made on his way out of the interview room. The prosecutor terminated his inquiry about the interview with defendant and moved to a different area of inquiry. The answer given by the detective was brief and ambiguous with no further comment at any time by the prosecutor. The court offered to advise the jurors to disregard the detective's statement, but the offer was declined by defense counsel.

► ***Guilty Plea - Probation***

Robert A. Spears v. State, No. 26834 (Mo. App. S.D. November 28, 2005). The circuit court did not err in denying probation because there was no evidence movant was promised probation following his guilty plea for DWI that he would be released and placed on probation if he successfully completed the 120-day treatment program to which he was committed under Section 559.115.3. The trial judge concluded, following a hearing, that release of movant on probation or a statutory release would be an abuse of discretion based on reports that movant would not commit to quit using alcohol. It stated that movant did not consider driving drunk to be a crime and that movant acknowledged that he drove when he was drunk "all the time."

► ***Prosecutorial Vindictiveness***

State v. Allen D. Potts, No. 26531 (Mo. App. S.D. November 23, 2005). The Court reversed defendant's conviction of possession of a controlled substance with the intent to distribute for prosecutorial vindictiveness when the prosecutor entered a *nolle prosequi* as to the original charge of possession, and re-filed the cause with the heightened charge of possession with intent to distribute on the same day, following the granting of a mistrial during jury selection. There is nothing in the record to suggest that the prosecutor was unaware of the facts necessary to bring the higher charge before the trial began. This action, in the context of this case, permitted no logical, non-vindictive explanation for this prosecutor's decision to re-file this case with a more serious charge on the same day defendant was granted a mistrial. Nothing suggested that the prosecutor's purpose was anything other than to deter the defendant from, or punish him for exercising his rights at trial. The Court stressed that the holding was based upon the facts and circumstances of this case and did not suggest that all cases in which a prosecutor brings higher charges after a defendant has successfully sought a mistrial justify applying a presumption of vindictiveness. On retrial, the prosecutor is not barred by double jeopardy from re-trying Appellant under the original charge of possession of a controlled substance as jeopardy had not attached because the mistrial was granted during jury selection.





ROBERT SEEK

Before NBC's "Ed," there was Bob...the *original* bowling alley lawyer. Well not exactly. While he doesn't run his office *from* a bowling alley, he does own a bowling alley in Eldon, MO. He admits that he "knows far more about the mechanics of bowling machines than any prosecutor should ever know."

Bob Seek was born and raised in Tipton, MO, which adjoins Miller County. He received his undergraduate degree from Central Missouri State University and his J.D. from the University of Missouri-Columbia.

At the same time he graduated from law school the newly elected Prosecuting Attorney in Miller County, who had graduated from Tipton High School 5 years ahead of Bob, needed help. Seek accepted a position as an assistant prosecutor. He immediately began doing trials and became hooked.

When the elected Prosecutor decided not to run for re-election, it was the logical course for Seek to run for the office. He served seven years as an assistant prosecutor in both Miller and Morgan Counties, and 18 years as the Elected Prosecutor in Miller County.

As a third class county prosecutor he has tried all types of cases from traffic offenses to murder cases; he has acted as a special prosecutor in several of the adjoining counties; and handled several cases involving embezzlement of funds in which he was able to take investigative reports and financial records and discover evidence not recognized by investigators or auditors.

His advice for new prosecutors? "Always try to be ethical in your conduct and do your best to see that justice is served by what you do. If you are ethical in making decisions then you will not be improperly influenced by politics nor let a conflict of interest cloud your decision. As prosecuting attorney you have the unwanted ability to make both sides of a case unhappy at the same time. If you act ethically and justice is served to the best of your ability, in the long term you will be respected more and in the short term you will be able to sleep at night knowing you have done your best in both respects."

"Sometimes you have to be practical also. Plea bargaining is not popular but in my Circuit it is indispensable. There is no way we could try even 10% of the felonies filed. Over the years I have slowly convinced advocates of no plea bargains that in many cases I can get someone's probation revoked for a violation before I could have ever had a trial on the underlying charge. There are certainly fewer issues on any post conviction motions also. Obviously, this has to be covered thoroughly with victims prior to taking the plea and you have to get law enforcement to recognize this as a valid strategy."

Seek is always proud when a victim compliments him or his staff. "Too many people today are too busy to say 'thank you' so you know the compliments are genuine." But he is most proud of the fact that after more than 25 years of jury trials he has never had a jury trial conviction reversed or set aside as the result of anything he did in the case.

While he says preparing for a jury trial is a pain, the trial itself is what he enjoys the most. "Within the trial, I enjoy gaining little concessions here and there and then tying them all together in closing argument."

His funniest moment in the courtroom? As an assistant prosecutor, he was doing a preliminary hearing on 4 individuals who robbed and tied up an elderly couple. (He was blind and she was getting senile.) She was asked if anyone in the courtroom looked familiar as possibly being one of the persons involved in this rather traumatic offense. After looking around for a while, she pointed to the elected Prosecutor and said, "You look familiar."

Bob served on the Citizens Advisory Board to the Probation and Parole office locally, on the Eldon Country Club Board of Directors, and is currently the President of the Eldon Bowling Association.

Bob and his wife Kathy have been married for 13 years. They have a son 12, and daughters 10 and 8 years old. "All three have far more musical talent than I ever had (from their mother) and are honor students." He also has a daughter 25, from a previous marriage and three grandchildren.

"Given the time required by being prosecuting attorney and my other interests, my days are full. I always try, however, to spend meaningful time with my family every day. You can be a public servant and still be a good father and husband. I urge all prosecutors to spend time being a parent and spouse. The time you let slip by can never be reclaimed."



MOPS TRAINING 2006

January 12-13, 2006	Elected Prosecutor Meeting	Big Cedar Lodge, Branson, MO
March 1-3, 2006	Protecting Lives, Saving Futures	Courtyard by Marriott Columbia, MO
April 12-14, 2006	MOPS Spring Statewide Training	Lodge of Four Seasons, Lake Ozark, MO
May 31-June 2, 2006	DWI/Vehicular Homicide Training	Tan-Tar-A Resort, Osage Beach, MO
July 31-August 3, 2006	Trial Advocacy School	Capital Plaza Hotel Jefferson City, MO
August 30-September 1, 2006	MOPS Fall Statewide Training	Lodge of Four Seasons, Lake Ozark, MO

NATIONAL CLE TRAINING January-February 2006

January 2006

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February 2006

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Jan 9-13	Sexual Assault Trial Advocacy: Meeting Common Defenses	NDA	NAC, Columbia, SC ▼
Jan 9-13	OJJDP 2006 National Conference	OJJDP	Washington, DC
Jan 17-20	Cross Examination	NDA	NAC, Columbia, SC ▼
Jan 23-27	Cybersleuth I	NDA	NAC, Columbia, SC ▼
Jan 23-27	Safety Net: Multidisciplinary Investigation and Prosecution of Computer Facilitated Child Sexual Exploitation	APRI	Dulles, VA
Jan 30-Feb 3	Trial Advocacy II	NDA	NAC, Columbia, SC ▼
Jan 31-Feb 2	NDA Capital Conference	NDA	Washington, DC
Jan 31-Feb 2	Hitting the Mark II: Implementing and Maintaining Community Gun Violence Prosecution Initiatives	APRI	San Diego, CA

Feb 5-9	Evidence for Prosecutors	NCA	San Francisco, CA
Feb 6-11	ChildProof	NDA	NAC, Columbia, SC ▼
Feb 13-17	Prosecutor Bootcamp	NDA	NAC, Columbia, SC ▼
Feb 19-23	Experienced Prosecutor Course	NCA	Chandler, AZ
Feb 21-24	Cross Examination	NDA	NAC, Columbia, SC ▼
Feb 27-Mar 3	Trial Advocacy I	NDA	NAC, Columbia, SC ▼

NATIONAL CLE TRAINING March-June 2006

March 2006

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Mar 6-9	Jury Selection	NDA	NAC, Columbia, SC ▼
Mar 6-9	Beyond Finding Words: Emerging Issues In Forensic Interviewing	APRI	Tunica, MS
Mar 12-16	White Collar Crime	NCDA	Washington, DC
Mar 13-17	Evidence Based Prosecution of DV Cases	NDA	NAC, Columbia, SC ▼
Mar 19-23	Successful Trial Strategies	NCDA	San Francisco, CA
Mar 20-24	Trial Advocacy I	NDA	NAC, Columbia, SC ▼
Mar 20-24	Finding Words Virginia (Week #1)	APRI	Richmond, VA
Mar 20-24	Finding Words Missouri - Presented by the MO Network Of Child Advocacy Centers		Union, MO
Mar 26-29	33rd National Conference on Juvenile Justice—Tough Cases: Advanced Training for Juvenile Prosecutors	APRI	Denver, CO
Mar 26-30	Prosecuting Drug Cases	NCDA	St Louis, MO
Mar 27-31	Trial Advocacy I	NDA	NAC, Columbia, SC ▼
Mar 27-31	Finding Words Arkansas (Week #1)	APRI	Rogers, AR

April 2-6	Office Administration Course	NCDA	Chicago, IL
April 3-7	Trial Advocacy I	NDA	NAC, Columbia, SC ▼
April 3-7	Finding Words Virginia (Week #1)	APRI	Richmond, VA
April 6-8	NDA Board of Directors Meeting	NDA	San Diego, CA
April 9	APRI Board of Directors Meeting	APRI	San Diego, CA
April 10-13	Cross Examination	NDA	NAC, Columbia, SC ▼
April 18-21	Elder Abuse	NDA	NAC, Columbia, SC ▼
April 23-27	Meeting Challenges in Prosecution and Victim Advocacy	NCDA	San Diego, CA
April 24-28	Arson and Explosives	NDA	NAC, Columbia, SC ▼

May 1-5	Trial Advocacy II	NDA	NAC, Columbia, SC ▼
May 7-11	Prosecuting Homicide Cases	NCDA	Phoenix, AZ
May 8-12	Trial Advocacy I	NDA	NAC, Columbia, SC ▼
May 8-12	Finding Words Delaware (Week #2)	APRI	TBD
May 16-19	Faculty Development	NDA	NAC, Columbia, SC ▼
May 21-25	Government Civil Practice	NCDA	Las Vegas, NV
May 22-25	Courtroom Technology	NDA	NAC, Columbia, SC ▼
May 23-25	Hitting the Mark II: Implementing and Maintaining Community Gun Violence Prosecution Initiatives	APRI	Minneapolis, MN
May 31-June 2	Cybercrime Summit	NDA	NAC, Columbia, SC ▼

June 4-8	Criminal Investigations Course	NCDA	Reno, NV
June 5-9	Prosecutor Bootcamp	NDA	NAC, Columbia, SC ▼
June 5-9	Investigation and Prosecution of Child Fatalities and Physical Abuse	APRI	San Antonio, TX
June 12-16	Trial Advocacy II	NDA	NAC, Columbia, SC ▼

NATIONAL CLE TRAINING June-December 2006

July 2006

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December 2006

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June 12-16	DNA: Basic	NDA	NAC, Columbia, SC ▼
June 18-29	Career Prosecutor Course	NCDA	Charleston, SC
June 19-23	Trial Advocacy I	NDA	NAC, Columbia, SC ▼
June 19-23	Finding Words Virginia (Week #2)	APRI	Richmond, VA
June 26-30	Lethal Weapon	NDA	NAC, Columbia, SC ▼
June 26-30	Finding Words Arkansas (Week #2)	APRI	Rogers, AR

July 10-14	Cybersleuth II	NDA	NAC, Columbia, SC ▼
July 10-14	ChildProtect: Trial Advocacy for Child Protection Attorneys	APRI	St Paul, MN
July 17-21	Prosecutor and the Jury	NDA	NAC, Columbia, SC ▼
July 24-28	Trial Advocacy I	NDA	NAC, Columbia, SC ▼
July 24-28	Equal Justice: Investigation and Prosecution of Child Abuse	APRI	Clearwater, FL
July 24-28	Finding Words Missouri - Presented by the MO Network Of Child Advocacy Centers		Columbia, MO
July 28-30	NDA Board of Directors Meeting	NDA	Santa Fe, NM
July 30-Aug 2	NDA 2006 Summer Conference	NDA	Santa Fe, NM
July 31-Aug 4	Trial Advocacy II	NDA	NAC, Columbia, SC ▼

Aug 7-11	Trial Advocacy I	NDA	NAC, Columbia, SC ▼
Aug 14-18	Unsafe Havens II	NDA	NAC, Columbia, SC ▼
Aug 21-25	Trial Advocacy I	NDA	NAC, Columbia, SC ▼
Aug 28-31	Cross Examination	NDA	NAC, Columbia, SC ▼

Sept 6-8	Gangs Symposium	NDA	NAC, Columbia, SC ▼
Sept 10-14	Evidence for Prosecutors	NCDA	Providence, RI
Sept 18-21	NDA Fall Conference	NDA	NAC, Columbia, SC ▼
Sept 25-29	Trial Advocacy I	NDA	NAC, Columbia, SC ▼
Sept 25-29	Finding Words Arkansas (Week #3)	APRI	Rogers, AR
Sept 25-29	Finding Words Virginia (Week #3)	APRI	Richmond, VA

Oct 8-12	National Conference on Domestic Violence	NCDA	Houston, TX
Oct 14-18	Executive Program	NCDA	Park City, UT
Oct 29-Nov 2	Prosecuting Drug Cases	NCDA	New Orleans, LA

Nov 12-16	Prosecuting Homicide Cases	NCDA	Savannah, GA
Nov 13-17	Finding Words Missouri - Presented by the MO Network Of Child Advocacy Centers		Union, MO
Nov 26-30	Prosecuting Sexual Assaults and Related Violent Crimes	NCDA	San Diego, CA

Dec 3-8	Government Civil Practice	NCDA	Las Vegas, NV
Dec 10-14	Forensic Evidence	NCDA	San Francisco, CA

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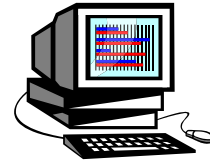
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facilitate communication among and between prosecutors and the criminal justice community.***